Award No. 5935
Docket No. 5720
2-UP-EW-'70

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

The Second Division consisted of the regular members and in addition Referee Paul C. Dugan when award was rendered.

PARTIES TO DISPUTE:

SYSTEM FEDERATION No. 105,
RAILWAY EMPLOYES' DEPARTMENT, A.F.L.-C.I.O.
(ELECTRICAL WORKERS)
UNION PACIFIC RAILROAD COMPANY

DISPUTE: CLAIM OF EMPLOYES:

1. That The Union Pacific Railroad Company violated the current agreement when it failed and refused to properly compensate Electrician W. H. Vincent for work performed on Washington's Birthday, February 22, 1967.

2. That accordingly, The Union Pacific Railroad Company be ordered to additionally compensate Electrician W. H. Vincent in the amount of eight (8) hours at time and one-half rate of pay for work performed on February 22, 1967, Washington's Birthday.

EMPLOYES' STATEMENT OF FACTS: Electrician W. H. Vincent, hereinafter referred to as the claimant, is regularly employed by the Union Pacific Railroad Company, hereinafter referred to as the carrier, at Los Angeles, California with a work week of Friday through Tuesday; Wednesday and Thursday being his rest days.

On February 22, 1967, Washington's Birthday, and also claimant's rest day, he was requested to and did work, eight (8) hours. The carrier compensated the claimant in the amount of eight (8) hours at time and one-half rate for service performed on his rest day under the provisions of rule 6 of the agreement, but refused to compensate him for eight (8) hours at time and one-half rate for service performed on Washington's Birthday, which is also provided for under rule 6.

This dispute has been handled with all officers of the carrier, up to and including the highest officer designated to handle such matters and all have declined to make a satisfactory settlement.

The agreement effective September 1, 1949, as Amended, is controlling.

POSITION OF EMPLOYES: It is respectfully submitted that the carrier violated the terms of the controlling agreement and damaged the claimant, when it failed and refused to compensate him for an additional eight (8)

worked on the holiday which also happened to be a 'vacation' day. **Assuming the correctness of the employes' theory, it would logically follow that if the claimants here had been required to work in excess of eight hours on the dates of claim, they would then be entitled to pay at 4-1/2 times the basic rate for the overtime hours. It is doubtful that any such absurd result was intended by the premium pay rules.**

We think it is clear that in the absence of rules showing a clear intent to the contrary (and we are not acquainted with any nor cited to any) that the premiums required for working on a vacation day which also happens to be a holiday were designed to operate on a concurrent non-cumulative or non-consecutive basis and that they were not intended to be pyramided. **Consequently the proper payment for the time actually worked by the claimants on December 26 was one and one-half time."** (Emphasis added)

The prohibition against double penalty payments for a single 8-hour tour of duty has also been upheld in the following denial awards rendered by the Third Division, National Railroad Adjustment Board:

2695 (Carter)	4710 (Connell)
2859 (Youngdahl)	5423 (Parker)
3146 (Carter)	5473 (Carter)
3780 (Swaim)	5548 (Elson)
4151 (Robertson)	6750 (Parker)

The carrier has conclusively shown herein that the Organization's position in this dispute is not supported by the agreement or the agreed to practices on this property, and this claim should be denied.

FINDINGS: The Second Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

The carrier or carriers and the employe or employes involved in this dispute are respectively carrier and employe within the meaning of the Railway Labor Act as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

Parties to said dispute were given due notice of hearing thereon.

Claimant worked on his regularly assigned rest day and which also was Washington's Birthday, February 22, 1967. He was paid for 8 hours work at the punitive rate and is claiming an additional 8 hours at said punitive rate for working said rest day-holiday.

Claimant relies herein upon Carrier's alleged violation of Rule 6 of the Agreement, captioned "Overtime on Rest Days and Holidays" and providing as follows:

"Rule 6. All overtime continuous with regular bulletin hours will be paid for at the rate of time and one-half until relieved, except as may be provided in rules hereinafter set out. Work performed by employes on their assigned rest days and on the following legal holidays, namely New Year's Day, Washington's Birthday, Decoration Day, Fourth of July, Labor Day, Thanksgiving Day, and Christmas (provided when any of the above holidays fall on Sunday, the day observed by the state, nation

or by proclamation shall be considered the holiday) shall be paid for at the rate of time and one-half."

Claimant is contending that Rule 6 provides two separate and distinct payments for work performed on an employe's rest day and work performed on any of the named legal holidays; that there are no exceptions in the rule that would permit Carrier to pay only "one" time and one-half payment for service performed on said day; that Carrier is attempting to secure here what they failed to obtain in its counter-proposals made to the employes on May 17, 1966, whereby Carrier proposed that a clause be inserted in the Agreement entitled: "Prohibition Against Multiple Time and One-Half Payments on Holidays".

Carrier's position is that this claim does not have contractual support, and that no provision of the Agreement can be construed to require double penalty payment as requested therein; that it has always been the accepted practice on the property that an employe who works on his rest day-holiday be allowed only one payment at the time and one-half rate; that there is no rule in the Agreement that contemplates payment of 16 hours at time and one-half rate for 8 hours of service under any circumstance; that the allowance of 8 hours pro rata holiday pay as provided for in Article II of the August 21, 1954 Agreement did not change the existing practice governing the payment for work performed by an employe on a holiday especially in view of Section 5, Article II, of said August 21, 1954 Agreement; that subsequent to the February 4, 1965 National Agreement, the Organization filed and later withdrew various claims of a similar nature as herein indicating Organization agreement that only one penalty payment is proper in this instance; that this Board is without authority to assess a penalty payment.

The Organization has cited a large number of awards upholding the claim for double pay for working on a rest day-holiday. However, close perusal of said awards indicates that they can be distinguished from the case at hand in that they contain separate holiday and rest day rules. We are not confronted herein with two separate rules governing rest days and holidays.

The Organization has also cited this Board's Award 5217, involving a similar rule and similar dispute. The Board in said Award 5217 concluded that the Rule involved was in effect two separate Rules, one requiring time and one-half payment for services performed on a holiday and the other requiring like compensation for services performed on a rest day. With this interpretation we do not agree. To reach such a conclusion would be adding to, varying, altering or changing the Agreement, which this Board is not empowered to do. Therefore, we find said Award 5217 not controlling herein for the determination of this dispute.

As was said in Third Division Award 16431:

"Therefore, since the Rule here does differ from those involved in prior cases, the issue cannot be decided merely by reference to this Board's precedents. It is necessary to determine the intent of Rule 29A.

"Intent may be gauged in part by conduct. * * * *."

Examination of this record on the property before this Board shows that Carrier contended that: "It has always been the accepted practice in applying the provisions of Rule 6 of the current Agreement effective September 1, 1949 that an employe who renders service on a holiday which is also his rest day has been allowed only one payment at time and one-half rate which fully satisfies the requirements of Rule 6." Further, it is undisputed that the Organiza-

tion did withdraw similar claims involving work on rest days-holidays. While it is true that withdrawal of a claim or claims does not conclusively show that said withdrawing party agrees with the contention of his adversary, nevertheless taken together with the past practice on this property it does show what the parties intended as to the intent and meaning of Rule 6 herein. It may be pointed out that the Organization did not dispute on the property the Carrier's said contention as to past practice, and did not specifically deny such contention in its Ex Parte Submission to this Board.

Therefore, we agree with the conclusions reached by the Third Division in its said Award 16431, when the Board said:

> "Since the rule is not explicit on the subject, reference to past practice is appropriate to establish intent. Since the Rule is a combined one, it cannot in any event be the basis for finding, as occurred in other cases, that separate rest-day and holiday rules require separate payments. Finally, since the Agreement is unlike those in prior cases, the principle of stare decisis is inapplicable."

For the aforesaid reasons, we are compelled to deny the claim.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

ATTEST: E. A. Killeen
Executive Secretary

Dated at Chicago, Illinois, this 20th day of May, 1970.

Central Publishing Co., Indianapolis, Ind. 46206 Printed in U.S.A.